IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. .

CARDOX CORPORATION,

Petitioner,

v.

C-O-TWO FIRE EQUIPMENT COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner asks this Court to review the decision of the Seventh Circuit Court of Appeals concerning the application of the venue provisions of the Judicial Code to patent cases—28 U. S. C., Secs. 1391(c) and 1400(b).

Petitioner, as justification for review, urges that the question of venue is an important one; that the Court of Appeals' decision creates a conflict of decision on the question of venue; and, that the decision of the Court of Appeals conflicts with applicable decisions of this Court concerning statutory construction.

The question of venue is, of course, an important question but we see nothing in this to warrant review. There are many questions of importance constantly decided by the Courts of Appeals and we understand that the functioning of the Courts of Appeals in this regard is to be reviewed by the Supreme Court only in exceptional cases,

for example, where there is conflict or where the Courts of Appeals have not acted.

In the present situation there is no conflict. The Seventh Circuit Court of Appeals is the only Court of Appeals which has passed on the question. It gave full and careful consideration to the question and we believe its decision is a sound one. Unless and until some other Court of Appeals differs, we see no reason to review the decision.

In an attempt to build up an atmosphere of conflict, petitioner points to the fact that there was a dissenting opinion in the Court of Appeals but this obviously creates no conflict. Petitioner in a further attempt to create an atmosphere of conflict points to three district court cases which, it says, reached a contrary result. However, one of these cases* is not only within the Seventh Circuit but is a decision by Judge Barnes himself and amounts to no more than the decision of Judge Barnes in the instant case which was reversed. The other two cases** are both in the Southern District of California and are the two cases which Judge Harrison of the Southern District of California stated he could not follow in the *Gulf Research* case.*** Not only did the Court of Appeals for the Seventh Circuit in the present case hold Judge Harrison's reasoning and decision to be correct, but the Court of

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* *Sponge Products* v. *Fuller Brush Company* (D. C. N. D. Ill., 1951), Civil Action 51 C 382, unreported and without opinion. However, we point out that the case included a number of grounds supporting the result. Petitioner in its brief in the district court conceded that the decision might have been based on these other grounds.

** *Radio Corporation of America* v. *Paramount Pictures, Incorporated, et al.* (D. C. S. D. Cal., 1950), Civil Action No. 8070-WM, unreported; *Farr Co.* v. *Gratiot, et al.*, 92 F. Supp. 320 (D. C. S. D. Cal., 1950).

*** *Gulf Research & Development Company, et al.* v. *Schlumberger Well Surveying Corporation*, 92 F. Supp. 16 (D. C. S. D. Cal., 1950).

Appeals for the Ninth Circuit, which ordinarily would be expected to reconcile any conflict of decision within its districts, declined to issue mandamus to reverse Judge Harrison and held that in its view no injustice had resulted from Judge Harrison's decision (*Gulf Research, etc. Co.* v. *Harrison,* 185 F. 2d 457). We think it only reasonable to assume that these earlier decisions alleged by petitioner to be conflicting would no longer be regarded as effective rules of decision even in the Southern District of California.

Petitioner attempts to show that the decision of the Court of Appeals in the instant case conflicts with applicable decisions of this Court but this contention will not withstand scrutiny. *Ex parte Collett* (337 U. S. 55) is cited, but in that case this Court considered and put great stress upon the very factors of statutory construction which moved the Court of Appeals in the instant case, namely, the legislative history of the Code. This Court there stated:

> "We cannot blind ourselves to the hearings, to the experts, to the Committee reports, to the reviser's notes and their incorporation in the Committee reports—to a history of the most meticulous Congressional consideration" (p. 71).

In the present case the Court of Appeals stated:

> "Moreover, as heretofore stated, the Reviser's Notes unmistakably disclose that the only change made in the patent venue section as it then existed was one of phraseology and not of substance."

Moreover, the construction of the present statute by the Court of Appeals is exactly in accord with the decision of this Court construing the predecessor patent venue statute in the *Stonite* case.* In both cases a general venue

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* *Stonite Co.* v. *Melvin Lloyd Co.* (315 U. S. 561) (1942).

provision was held to be inapplicable to patent cases and the patent venue section was held to be the exclusive provision controlling patent cases.

Before concluding we should mention that mandamus is plainly an appropriate remedy in the instant case. The venue protection against expense and inconvenience of trial in a remote jurisdiction, which defendant asked for in the District Court, was denied. Since the requested protection was against expense and inconvenience of trial, the protection would be destroyed by trial and could not be restored by subsequent appeal. *Mandamus* is therefore plainly appropriate and the case presents no common ground with the case of *Gulf Research, etc. Co.* v. *Hon. Paul Leahy, et al.* in the Third Circuit, now before this Court on Petition for Writ of Certiorari. In that case a plaintiff invoked an asserted privilege of suing in one of several places and the Court held that if this privilege had been improperly denied it could be restored by a reversal on appeal after trial—quite a different question than is presented here.

Conclusion

It is submitted that there is no conflict of decision to warrant review by this Court; that the decision of the Seventh Circuit Court of Appeals is correct and is in accordance with the prior decisions of this Court. It is submitted that the petition should be denied.

Respectfully submitted,

R. Morton Adams,
Irving Herriott,
Edward T. Connors,
Counsel for Respondent.

April , 1952.